No. 06-637

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F., ON BEHALF OF GILBERT F., A MINOR CHILD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Agudath Israel of America, founded in 1922, is a national Orthodox Jewish organization. One of Agudath Israel's functions is to advocate the interests of the member schools of Torah Umesorah – The National Society for

Hebrew Day Schools, and the students and parent bodies they serve. Over the last few decades, the educational needs of learning disabled and otherwise handicapped children have occupied an increasingly prominent position on the Orthodox Jewish community's agenda of priorities. In recognition of this trend, Agudath Israel in 2000 established a division – "Project LEARN" – to work with parents and schools in the Orthodox Jewish community to help special needs children access appropriate and necessary educational services.

In the Second Circuit below, when the court was considering *Frank G.* v. *Board of Education of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), Agudath Israel participated (along with New York Lawyers for the Public Interest, Inc., Advocates for Children of New York, Inc., The Legal Aid Society of New York City and several other groups) in a larger *amicus curiae* brief expressing support for the position the court ultimately adopted. Agudath Israel continues to support that position, and the specific arguments advanced by the respondent and *amici* on its behalf, but respectfully submits this short independent *amicus* presentation, with the consent of the parties, to focus briefly on two issues of particular concern.[1]

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. REQUIRING A SPECIAL NEEDS CHILD TO SUFFER THROUGH AN INAPPROPRIATE PUBLIC SCHOOL PLACEMENT AS A PREREQUISITE TO TUITION REIMBURSEMENT FOR A PARENT'S UNILATERAL PLACEMENT IN AN APPROPRIATE PRIVATE SCHOOL IS INDEED "ABSURD"

In its *Frank G.* decision below, the Second Circuit, applying the general rule of statutory construction that "ambiguous statutes are to be construed so as to avoid absurd results," concluded that the result would indeed be absurd if 20 U.S.C. §1412 (a)(10)(C)(ii) would be read to preclude reimbursement where a special needs child in an appropriate private school setting had not previously attended the inappropriate public school placement offered by the public agency. 459 F.3d at 372.[2]

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[2] The Second Circuit offered two reasons it considered such a reading of § 1414 (a)(10)(C)(ii) "absurd": It would preclude tuition reimbursement for children if their disabilities were detected before school age, and it would require parents to acquiesce to an inappropriate placement in order to preserve their right eventually to seek reimbursement for an appropriate private school placement. 459 F. 3d at 372. Our discussion in the text focuses on this second reason. However, we would respectfully offer yet an additional reason why petitioner's reading of the statute could lead to results that are "absurd." School districts occasionally fail in their responsibility to offer a free and appropriate public education not by offering an inappropriate public school placement, but by offering no placement whatsoever. In such cases, if a parent finds a private school setting that is appropriate, tuition reimbursement would be unavailable under petitioner's reading of the statute because the child never received services from the public agency – despite the fact that the public

Petitioner pooh-poohs the Second Circuit's concern that forcing the child to accept a school district's recommended public school placement could be harmful to the child's development:

> "The Court of Appeals' assumption appears to be premised upon the notion that the public entity is unable to provide an appropriate education in the first place, and is incapable of reaching a speedy determination of the inappropriateness of the public placement where it is, in fact, inappropriate. There is, however, no basis in fact for an assumption that clearly discounts the expertise of school officials who are charged with the responsibility of performing their obligations under the Act.
>
> "In interpreting the 'previously received' language, the Court of Appeals assumed that the IEP will be inappropriate and will jeopardize the child's health and education. App. 105a. The IDEA does not require that a child would have to be enrolled for any minimum period of time in the school district's proposed placement prior to a unilateral private placement. Instead, the statute simply requires that the parent first give the public school's placement a try, which can hardly be characterized as an absurd result." [Petitioner's Brief at 22.]

Before a parent can recover tuition reimbursement for a unilateral private school placement, however, the parent must demonstrate to a hearing officer or a court of law that the school district failed in its duty to provide the child with a

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agency never offered services. The absurdity of such an outcome requires no elaboration.

"free appropriate public education," and that in contrast the private school setting chosen by the parent is appropriate. *Schaffer* v. *Weast*, 546 U.S. 49 (2005). At issue, therefore, is a scenario where, for all the vaunted "expertise" of the public officials who recommended a public school placement for the child, the parent is ultimately vindicated in his judgment that the recommended placement was in fact inappropriate.

The entire premise of the IDEA is that children with special needs, even more so than mainstream children, require an educational setting that is appropriate for their specific circumstances. Getting it wrong could have far-reaching detrimental consequences for the healthy development of the child. As the court noted in *Connors* v. *Mills*, 34 F. Supp. 795, 804 (N.D.N.Y. 1998): "Given the fragile state of many disabled children and their dire need for constant and consistent care, even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional and psychological deterioration."

In light of that reality, petitioner's contention that a parent, persuaded though he may be (and vindicated though he ultimately is) that the recommended public school placement is inappropriate for his child, must nonetheless "first give the public school's placement a try" – and petitioner's cavalier assurance that this indeterminate try-out period will not "jeopardize the child's health and education" – is not only "absurd"; it is cruel, and potentially destructive.

II. EVEN IF §1412 (A)(10)(c)(ii) IS READ AS PROVIDING THE EXCLUSIVE AVENUE TOWARD REIMBURSEMENT, THE PHRASE "PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY" DOES NOT IMPLY THAT THE PARENT MUST HAVE PREVIOUSLY "GIVE[N] THE PUBLIC SCHOOL'S PLACEMENT A TRY," AS PETITIONERS CLAIM, BUT ENCOMPASSES ANY FORM OF SPECIAL EDUCATION AND RELATED SERVICES PREVIOUSLY RECEIVED THROUGH A PUBLIC AGENCY

For the reasons spelled out in the Second Circuit's *Frank G.* ruling below, and in the briefs of respondent and other supporting *amici*, Agudath Israel urges the Court to reject petitioner's suggested reading of 20 U.S.C. §1412 (a)(10)(C)(ii) as establishing an absolute ban against the equitable remedy of tuition reimbursement if the child has not "previously received special education and related services under the authority of a public agency." This section of the IDEA should not be read as providing the exclusive means through which reimbursement may be sought.

But even if the Court concludes otherwise, and interprets the IDEA as allowing for reimbursement only where the child has "previously received special education and related services under the authority of a public agency," petitioner's proposed interpretation of this phrase as "simply requir[ing] that the parent first give the public school's

placement a try" [Petitioner's Brief at 22] is contrary to the plain language of the statute and must be rejected. Public agencies like the New York City Department of Education furnish various forms of special education and related services to children in public and nonpublic schools alike, and there is nothing in §1412 (a)(10)(C)(ii) that limits the types of services previously received to a school district's recommended public school placement.

The issue was squarely addressed in *M.M.* v. *School Board of Miami-Dade County*, 437 F.3d 1085 (11th Cir. 2006). Parents of a three-year-old hearing-impaired child, insisting that their child required a particular form of hearing therapy that the school district refused to provide, enrolled their child in a private pre-school program where the therapy was available, and sought IDEA reimbursement for the costs of the therapy. The school district argued that the parents' refusal to accept the district's proposed placement disqualified them from seeking reimbursement, as the child had not "previously received special education and related services under the authority of a public agency." The Eleventh Circuit rejected the district's argument, pointing out that the child had received various forms of special education and related services prior to the age of three under the county's Early Intervention Program, thereby satisfying the "previously received services" language of the statute. 437 F.3d at 1098.

The First Circuit dicta in *Greenland School District* v. *Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004) ("tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)"), upon which petitioners rely, has no basis in the language or history of the law. Similarly, the District

Court's conjecture below that the "previously received services" language of the law "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate," *Board of Education of the City School District of the City of New York* v. *Tom F.*, 2005 WL 22866, 22868 (S.D.N.Y. 2005), is belied by the far more inclusive general language of the statute.

As noted above, there are many ways by which a public agency can provide special education and related services to students in a variety of settings, including students in private schools. Under the IDEA, "a proportionate amount of Federal funds" must be set aside to service private school children, which services may be provided on private school premises. 20 U.S.C. §1412 (10)(A)(i). Some states, including New York (N.Y.S. Education Law §3602-c), go even farther, independently mandating the equitable provision of special education services to nonpublic school students. Such services can include things like tutoring, speech and occupational therapy, health paraprofessionals, and the full range of other interventions that come under the heading of "special education and related services."

It is not uncommon, in Agudath Israel's experience, for a parent to enroll a child in a mainstream private school and receive special education and related services through a local school district; and then, when it becomes apparent that the child requires a more intensive special education program, to enroll the child in an appropriate private school for more intensive services. Assuming such a parent is able to demonstrate the failure of the school district to provide an appropriate public school program, he would clearly qualify under the plain language of §1412 (a)(10)(C)(ii) to seek reimbursement. The child has most assuredly "previously received special education and related services under the

authority of a public agency," even though he may never have attended public school.

Petitioner's attempt to rewrite the law to require "that the parent first give the public school's placement a try" is without foundation. It is also quite ironic, as it flagrantly violates the very principle upon which petitioner's main argument is premised: "Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States* v. *Albertini*, 472 U.S. 675, 680 (1985)." [Petitioner's Brief at 20.]

CONCLUSION

For the reasons set forth herein, Agudath Israel of America respectfully urges the Court to affirm the decision of the Second Circuit below, and to reject petitioner's faulty reading of 20 U.S.C. §1412 (a)(10)(c)(ii).

Respectfully submitted,

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